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No. 86-358

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Appellees

On Appeal from the Supreme Court of Arkansas

REPLY BRIEF FOR THE APPELLANTS

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The Arkansas Highway Use Equalization (HUE) tax imposes an effective tax rate that is three to five times higher for trucks registered outside the State than for those registered in the State. The Jurisdictional Statement demonstrated that this tax violates the Commerce Clause because it discriminates against out-of-state trucks and is not fairly related to the services provided by the State—use of the highways—for which the tax is levied.

Appellees fail to come to grips with these defects. Indeed, they concede that flat taxes "will inevitably result in different payments per mile based upon the number of miles traveled in the taxing jurisdiction" and thus involve an "inherent disparity in cost per mile" (Mot. to Dis. 7, 12). Moreover, they do not dispute that such discrimination was the intended effect of the Arkansas statute. Nor do they contest that the ever-increasing number of local preferences and retaliatory countermeasures that states have recently adopted in the highway tax area represent precisely the sort of trade war that the Commerce Clause was designed to prohibit. Finally, appellees acknowledge that the Vermont courts

have issued decisions "inconsistent" with the decision below.

Nevertheless, appellees assert that this appeal involves no substantial constitutional question. Appellees' arguments obscure but do not refute the compelling reasons supporting plenary review of the Commerce Clause issue presented here.

1. Appellees initially emphasize (Mot. to Dis. 6-7) that the HUE tax is neutral on its face and applicable to both in-state and out-of-state trucks. But that fact is entirely beside the point. It is well established that the Commerce Clause condemns a facially neutral tax that is discriminatory in effect. See J.S. 11-12 & n.5.

In seeking to uphold the tax notwithstanding its disparate impact, appellees, like the Arkansas Supreme Court, place sole reliance on the *Aero Mayflower* line of cases first decided by this Court more than 50 years ago. However, appellees do not attempt to square those rulings with this Court's modern Commerce Clause jurisprudence or to justify application of the rulings to the interstate trucking industry of the 1980s. As demonstrated in the Jurisdictional Statement (at 22-26), the *Aero Mayflower* line of cases was grounded in the circumstances, both legal and factual, of an earlier day. Contrary to appellees' approach, those decisions cannot be viewed in isolation or mechanically invoked without further thought; rather, they must be harmonized with contemporary Commerce Clause principles.

Following the reasoning of *Aero Mayflower*, appellees assert (Mot. to Dis. 8 (emphasis in original)) that the HUE tax "is not levied on *actual use* of the roads, but upon the *privilege* of making such use," and that, as a privilege tax, it is consistent with the Commerce Clause. But the Court's recent Commerce Clause cases have firmly rejected this kind of formalistic approach. See J.S. 24, 26. "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely

obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288 (1977).

Appellees also repeat the shibboleth that an out-of-state trucker who is given the " 'privilege [to use a state's highways] without limit is not wronged by his own refusal to enjoy it as freely as he might' " (Mot. to Dis. 8, quoting *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285, 289 (1935)). As discussed in the Jurisdictional Statement (at 25), such a view ignores the realities of the modern interstate trucking industry. To say that an interstate trucker whose business takes him to many states "refus[es]" to drive more miles in Arkansas is specious; an interstate truck can be in only one state at a time, and its route is governed by the demands of its shippers. Furthermore, as an increasing number of states adopt flat highway taxes, each certainly cannot justify its levy on the theory that trucks should spend more time in that state and less in others.

In the end, the *Aero Mayflower* line of cases can no longer be reconciled with either prevailing constitutional doctrine or common sense. Flat highway taxes work to favor intrastate over interstate commerce and locally-based over out-of-state trucks. That is discrimination pure and simple, and such local favoritism offends the central purpose of the Commerce Clause. As shown by the increasing number of states that recently have passed flat highway taxes, the time has come for the Court to so hold.

2. a. Appellees try to avoid the need for plenary review by arguing (Mot. to Dis. 9-10, 12) that the Court recently adhered to the *Aero Mayflower* line of decisions in *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444 (1978). However, those cases did not involve a challenge to the constitutionality of flat taxes under the Commerce Clause, and they referred to the *Aero Mayflower* decisions only by way of

analogy. Moreover, in neither case was it shown that the challenged tax discriminated between in-state and out-of-state taxpayers. Finally, in neither *Evansville* nor *Massachusetts* was the Court asked, as it is here, to reconsider the authority of *Aero Mayflower* in order to bring it into accord with more recent legal and factual developments.

The fee at issue in *Evansville* was not a flat tax but instead was imposed on airline passengers each time they used the airport. Indeed, the Court in *Evansville* specifically noted that the fee did not "discriminate[] against interstate commerce" and that "there is no showing of any inherent difference between these two classes of flights [interstate and intrastate], such that the application of the same fee to both would amount to discrimination against one or the other" (405 U.S. at 717, citing *Nippert* v. *Richmond*, 327 U.S. 416 (1946)). Such a fee is exactly the kind of levy that, in contrast to the Arkansas HUE tax, operates to treat all users equally and is proportionate to the governmental services provided.

Massachusetts did not concern the Commerce Clause at all but rather the implied immunity of states from a federal flat tax on aircraft. Because the tax was imposed by the United States, *Massachusetts* did not present the problem raised here of one taxing authority acting to discriminate in favor of its own taxpayers and against others. And in contrast to *Massachusetts*, where the Court found that there was no danger that the federal government would single out states for unfavorable treatment, there *is* a distinct danger, and one that is rapidly coming to pass, that states will use flat highway taxes to place a disproportionate burden on out-of-state taxpayers. See J.S. 8, 12. In addition, because there was only a single taxing authority, *Massachusetts* did not present the problem of cumulative burden caused by adoption of flat taxes in a number of states.

b. Appellees also suggest (Mot. to Dis. 10-11, 12-13) that the non-discrimination and proportionality requirements of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. at 279, are limited to general revenue taxes and do not apply to so-called "user" taxes. They rely on the passage in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 621 (1981), where the Court, in considering the validity of a general revenue coal severance tax, "put to one side" those cases in which the Court reviewed challenges to user fees or taxes.

Contrary to appellees' suggestion, the Court's user tax decisions have consistently recognized the applicability of the basic Commerce Clause prohibition against discrimination, including, in the 1972 *Evansville* case, *Nippert*'s teaching that flat taxes, even if facially neutral, violate the Commerce Clause because they are not proportioned to out-of-state firms' typically lesser presence in the taxing state. See, *e.g.*, *Evansville*, 405 U.S. at 717 (citing *Nippert, supra*); *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 186, 190 (1931). Moreover, the footnote in *Commonwealth Edison* immediately following the above-quoted language makes clear that user taxes are subject not to a *lesser* standard than other state taxes but instead to the *additional* requirement that their amount not be "manifestly disproportionate to the services rendered" (453 U.S. at 622 n.12 (citations omitted)).[1]

Accordingly, *Commonwealth Edison* contradicts, rather than supports, appellees' assertion that the *Complete Auto*

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[1] The *Commonwealth Edison* footnote begins with a quotation from the same paragraph of the *Interstate Transit* opinion in which the Court recognized that, to be deemed a valid highway user tax and not a forbidden tax on the privilege of engaging in interstate commerce, a tax had to be (1) proportional to interstate vehicles' "extent or manner of use" of the state's highways, (2) not discriminatory, *and* (3) not "unreasonably large." 283 U.S. at 190. Justice Brandeis, writing for the Court, concluded that it was not necessary to reach the nondiscrimination or excessiveness requirements because the challenged tax (levied on interstate buses' carrying capacity) "[did] not rise with an increase in mileage traveled" or otherwise meet the proportionality requirement. *Ibid.*

standard has no application to user charges. As the Court explained only a few weeks before the *Commonwealth Edison* decision, "*no* state tax may be sustained" unless it satisfies the *Complete Auto* test. *Maryland* v. *Louisiana*, 451 U.S. 725, 754 (1981) (emphasis added).

3. a. Having failed to sustain the Arkansas HUE tax on legal grounds, appellees go to considerable lengths (Mot. to Dis. 15-20) to contest the probativeness and reliability of appellants' showing of the discriminatory effect of the tax on out-of-state trucks. The short answer to the State's contention is that the Arkansas Supreme Court accepted the existence of a discriminatory effect for purposes of its decision but nonetheless held, as a matter of law, that the discrimination did not violate the Commerce Clause. The validity of that *legal* holding is the question presented to this Court for review. Appellees do not answer that question by renewing their argument, which was not accepted by either court below, that no discrimination was in fact established.

In any event, appellees' exceptions are without merit. Their principal submission is that, because trucks legally are free to register in any one of a number of states, the state of registration "is no real indicator of whether [the truck] is domestic or non-domestic for purposes of establishing parochial discrimination under the Interstate Commerce Clause" (Mot. to Dis. 18 (emphasis omitted)). In practice, however, trucks generally do register in a state based on their operations and ownership there. If a state sought to discriminate against out-of-state trucks, imposing a tax on the basis of the place of registration would provide an effective means for doing so. Indeed, a number of courts have held that taxes based on state of registration discriminate between in-state and out-of-state enterprises (see J.S. 9-10).[2]

[2] It also is significant that the Arkansas legislature has enacted a statute to provide reimbursement for retaliatory taxes that other states impose on *Arkansas-registered* trucks in response to the

b. Appellees suggest (Mot. to Dis. 17) that, because some Arkansas-registered trucks are part of interstate commerce, the HUE tax does not violate the Commerce Clause. But the Commerce Clause does not permit a state to favor a local company over an out-of-state business simply because both are engaged in interstate commerce. See *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 355 (1977). Similarly, it is irrelevant that the Arkansas HUE tax does not discriminate against out-of-state vehicles with surgical precision—*i.e.*, that a small proportion of Arkansas-registered trucks (the 1.6% that drive fewer than 3500 miles per year) are not benefited, while some non-Arkansas-registered trucks (the 24.2% that annually travel more than 3500 miles in Arkansas) are not disadvantaged (or not disadvantaged as much). A tax that generally discriminates in favor of in-state over out-of-state taxpayers is not saved simply because some of the former are not helped or some of the latter are not harmed. See *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 40, 42-43 (1980); *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 n. 4 (1951).

These principles are an integral element of the holdings in the "drummer tax" cases. See J.S. 12-14. In *Nippert* v. *Richmond*, *supra*, for example, the activities of both the out-of-state solicitor and his in-state competitor undoubtedly involved interstate commerce. Moreover, the challenged Richmond tax applied not only to out-of-state solicitors but also to Virginia companies without a fixed place of business in the city. Despite the fact that the tax did not discriminate between interstate and intrastate commerce, and despite the fact that the municipal tax could disadvantage some Virginia solicitors

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Arkansas HUE tax. See J.S. 19-20; Ark. Stat. Ann. §§ 75-817.4-75-817.5 (Supp. 1985) (J.S. App. 41a) Arkansas' willingness to expend state funds to reimburse the owners of such trucks is convincing proof that in-state registration is indicative of in-state ownership.

along with out-of-state solicitors, the Court held that the general discrimination in favor of local over out-of-state businesses violated the Commerce Clause (327 U.S. at 431-432):

> It is true that the tax may strike as heavily upon some Virginia solicitors, and even upon some who confine themselves to Richmond, as it does upon others who come periodically or otherwise from Washington, New York or Cedar Rapids. And it may bear upon a few of the former more heavily than upon most of the latter. But neither consequence is the more probable one for the larger number of cases. The strong likelihood is the other way.

See also, *e.g.*, *Halliburton Oil Well Co.* v. *Reily*, 373 U.S. 64, 69 (1963).

c. Appellees distort the operation of the International Registration Plan ("IRP") in an attempt to show that out-of-state carriers pay a lower per-mile registration fee to Arkansas than in-state carriers and that such disparity can offset the discriminatory impact of the HUE tax (Mot. to Dis. 16-17). Appellees' argument is flawed on two grounds. First, it is improper to consider the registration fee and the HUE tax together because, for the reasons discussed in ATA's Jurisdictional Statement (at 20-24) and Reply Brief (at 5-6) in the companion case of *American Trucking Associations, Inc.* v. *Scheiner*, appeal docketed, No. 86-357 (U.S. Sept. 3, 1986), the compensatory tax doctrine has no application here.

Second, appellees' manipulation of the IRP formula is misleading and unrealistic. Appellees offer a hypothetical (Mot. to Dis. 16) that assumes that Arkansas-registered and non-Arkansas-registered trucks travel the same number of miles in Arkansas but travel widely divergent numbers of total miles. In fact, the record plainly establishes that Arkansas-registered trucks average many times more miles in the State annually than non-Arkansas-registered trucks (PX 38, 40, 46, 64) and that the typical truck subject to the HUE tax averages 70,000 miles annually in

all states combined (PX 52). Accordingly, the proper comparison of IRP costs is among trucks with the same annual mileage in all states combined, but different annual mileages in Arkansas. Under such a comparison, all IRP vehicles have an *identical* Arkansas registration fee per mile regardless of their respective mileages in Arkansas.[3]

4. Finally, appellees raise (Mot. to Dis. 20-22) the hobgoblin of administrative convenience. In their view, repudiation of the *Aero Mayflower* line of cases would hamstring state taxation of freight carriers.

The Jurisdictional Statement demonstrated that the discrimination resulting from the Arkansas HUE tax is not only unconstitutional but also entirely unnecessary given the availability of feasible alternatives. Mileage-based levies, such as a fuel tax, have long existed and are employed in every state. Fuel taxes in particular—

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[3] Under the IRP, the Arkansas registration fee is computed as the product of

$$\text{(annual Arkansas registration fee of \$1044)} \times \frac{\text{(in-state miles)}}{\text{(total miles)}}.$$

The registration fee per mile traveled in Arkansas is that product divided by the number of in-state miles, so that the in-state miles in the numerator and denominator cancel each other out and leave simply the annual Arkansas registration fee divided by the total miles in all states combined. For example, under the IRP, a truck that travels 2900 miles in Arkansas out of a total of 70,000 miles nationwide would pay an Arkansas registration fee per mile of:

$$\$1044 \times \frac{2900}{70{,}000} \times \frac{1}{2900} = 1.5¢/\text{mile}.$$

By contrast, a truck that travels the same number of miles in all states combined, but drives 19,000 miles in Arkansas, would pay an Arkansas registration fee per mile of:

$$\$1044 \times \frac{19{,}000}{70{,}000} \times \frac{1}{19{,}000} = 1.5¢/\text{mile}.$$

Thus, the Arkansas registration fee per mile will be the same for all IRP trucks driving the same number of miles in all states combined, regardless of their respective miles in Arkansas (see PX 56).

which are directly related to the weight, distance traveled, and wear and tear attributable to each truck, see *American Trucking Associations, Inc. v. O'Neill*, 522 F.Supp. 49, 56 (D. Conn. 1981)—are fully adequate to enable a state to exact fair and non-discriminatory reimbursement from in-state and out-of-state carriers alike for the wear and tear they cause to the state's roads.

Respectfully submitted.

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